

**APPLICANTS:**  
**Andrew King and Kathleen Meehan**

**REQUEST:** A variance to permit a retaining wall to be located within a recorded easement

**HEARING DATE:** June 15, 2005

**BEFORE THE**  
**ZONING HEARING EXAMINER**  
**FOR HARFORD COUNTY**  
**BOARD OF APPEALS**  
**Case No. 5477**

### **ZONING HEARING EXAMINER'S DECISION**

**APPLICANTS:** Andrew King and Kathleen Meehan

**LOCATION:** 312 Ponfield Road West, Tuckahoe Farms subdivision, Forest Hill  
Tax Map: 40 / Grid: 1F / Parcel: 422 / Lot: 21  
Third Election District (3rd)

**ZONING:** R3 / Urban Residential District

**REQUEST:** A variance, pursuant to Section 267-26C(6), of the Harford County Code, to permit a retaining wall to be located within a recorded easement.

#### **TESTIMONY AND EVIDENCE OF RECORD:**

The Applicant, Andrew King first testified. Mr. King and his co-applicant, Kathleen Meehan, purchased the subject property in May 2004. Beginning in March 2004, the parties began to make plans to install a swimming pool. The Applicants subsequently received all necessary permits and approval from their homeowner's association for construction of the pool.

According to the application, the property consists of approximately .176 acres and is located in the Tuckahoe Farms subdivision in Harford County. The property is improved by a single-family residence and attached two-car garage.

Harford County Development regulations require a 4-foot high fence around all swimming pools. Accordingly, the Applicants amended their request to their Homeowner's Association for permission to build the necessary fence.

The subject property adjoins the property of four neighbors. Each of those neighbors has a fence, although those fences are less than 4 feet high. The Applicants appeared to complain that the neighbors' fences were not 4 feet high. If they had been 4 feet high, the Applicant implied that they could use those fences in order to meet the County fence requirement around the pool.

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Nevertheless, the Applicants did, in fact, meet the County fence requirement by installing a 4 foot high fence, much of which is along the top of a newly constructed retaining wall located on the rear property line of their property.

According to Mr. King, the pool contractor was to have installed the pool to within one foot of the existing grade of the back yard. However, the contractor instead elevated the pool as much as 3 feet out of the ground. This is most visible at the rear of the pool at the point closest to the property's rear lot line. According to Mr. King, the pool was not intended to be elevated out of the ground, but the contractor refused to correct the problem. Accordingly, and as a result of the contractor's error, the pool appears to be at walk-out grade level directly to the rear of the house, but is about 3 feet out of the ground toward the rear property line.

A retaining wall was then built to create a new grade to the back yard of the subject property. This had the effect of elevating the grade around the back of the pool so that the pool no longer sticks out of the ground, but is flush with the new grade caused by the new retaining wall. The location of the pool and the grade is demonstrated by the photographs offered by both the Applicants and the Protestants. (See Protestants' Exhibit No. 21 and 10.)

A perhaps unintended consequence of the creation of the retaining wall is that the fence, which is now constructed along the top of the retaining wall, appears to be approximately 2 to 3 feet above the level of the fences of the neighbors and located along adjoining property lines. The retaining wall itself appears to be approximately 2-1/2 feet off the rear property line, which leaves a drainage area to the back of the subject property. Unfortunately, the retaining wall is built within a platted and recorded Harford County drainage and utility easement area, in which no structures are allowed to be constructed.

Subsequently, the Applicants obtained a letter from the Department of Public Works/Engineering, Cheryl Banigan, acknowledging that the County has no problem with the construction of the retaining wall in the easement area. In her letter dated December 22, 2004, Ms. Banigan states:

“... The location of the retaining wall does not appear to contribute to any drainage problems since the site has been graded to flow to the side yard easement.”

The letter further went on to state that;

“If the retaining wall is shown to contribute to any drainage problems in the future, it must be removed at the homeowner's expense.”

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The Applicants indicated that 12 of their neighbors have given approval for the construction of the pool and improvements, including the retaining wall. (Applicants' Exhibit No. 19). The Applicants indicated, however, that most of their immediately adjoining neighbors did not join in the petition.

Mr. King described the lot as being unusual and surrounded by four other lots, all of which adjoin his side and rear lot lines. There is also a concrete drainage structure in the back corner of his lot. Before he constructed the retaining wall and related improvements, his back yard suffered drainage problems, often containing standing water and being muddy. Mr. King believes that the retaining wall helps with drainage and benefits both he and his neighbors.

Next testified Brian Rynn, who resides at 314 Ponfield Road West, and is Mr. King's immediately adjoining neighbor to the west. Mr. Rynn is one of the original owners in the subdivision and was aware of the drainage problem which existed on the subject property prior to Mr. King's purchasing the property and installing a pool and retaining wall. According to Mr. Rynn, the rear yard property was very wet and muddy after it rained, with water backing up from the concrete drainage structure. The slope of the lot prior to the construction of the retaining wall, accelerated the water flow onto the rear of the property. Mr. Rynn feels that the retaining wall is a better solution and helps eliminate water flow and resulting drainage problems. Mr. Rynn helped construct the retaining wall and helped insure that the elevations were right, and that the slope of the remaining drainage area is correct. Mr. Rynn sees no problem with the retaining wall. He is able to see the pool and improvements on the subject property from his property, and he finds these improvements to be pleasing. He also believes, based upon his personal observations, that the drainage on the King property is now better than it was prior to the construction and improvements. Mr. Rynn also has a swimming pool on his property.

Next testified Anthony McClune for the Harford County Department of Planning and Zoning. Mr. McClune said that the subject property is unique due to its configuration. The property is subject to three drainage and utility easements, a 5 foot utility easement along each side lot line, and a 10 foot utility easement along the rear lot line. Mr. McClune says that the present application is for the location of the retaining wall only and does not concern itself with the fence or the pool. The Department feels that the retaining wall is the best solution for the property which obviously has had drainage problems in the past.

Mr. McClune also noted that if there were not a 10 foot rear yard drainage and utility easement, there would be no reason for the requested variance, and the retaining wall could be constructed as a matter of right. While a permit for both the fence and retaining wall would have been necessary, the Applicants would not have needed a variance and the permits would have been issued.

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Next in opposition testified Perry Martinelli, who lives directly behind the subject property on Lot 19. Mr. Martinelli does not recall being asked about the fence and would not have had a problem if the Applicants had asked him if he would allow his fence, which is 4 feet in height, to be used as part of the fence around the pool.

Mr. Martinelli disputed the allegations of the Applicant concerning drainage. He does not recall any drainage problem before the retaining wall was built. Now, drainage problems exist in the area, which he attributes to the construction of the retaining wall. Mr. Martinelli submitted photographs into the record, marked as Protestant's Exhibits 1-23, which he described as showing standing water on his property attributable to the construction of the retaining wall. Mr. Martinelli believes that the retaining wall interferes with the proper drainage from the surrounding properties to the concrete drainage structure.

Next in opposition testified Nancy Romaniello. Mrs. Romaniello is concerned by the location of the pool. She said that it is located at the same level as the top of the fence on her property, which is at her eye level. She testified there is now standing water on her property which she attributes to the retaining wall. There is also some soil erosion. These are all conditions which did not exist before the construction of the retaining wall and the change in elevation of the slope.

Next to testify was Diane Carminati, on behalf of the Tuckahoe Manor Homeowners Association. Ms. Carminati stated that the Applicants were violating the private declaration of covenants and restrictions of the Homeowners Association in a number of ways. The top of the pool itself must not be allowed to project above the top of the finished grade of the lot. Ms. Carminati stated the pertinent declarations defined finished grade as "the grade that exists upon the construction of the home". Any change in that grade is not considered to be the "finished grade". Accordingly, the pool, being allowed to originally protrude above the grade by 3 feet, is in violation. Furthermore, the covenants prohibit any improvement to a lot which changes the topography of the lot. The re-grading of the property constitutes a change in the topography, which is a violation of the covenants. The neighbors and the Association find this to be objectionable.

The Homeowners Association did approve the plans for the pool; however, those plans called for the pool to be placed well into the ground – not to project above the ground. The pool as constructed is not approved by the Homeowners Association. The Homeowners Association has taken no action, pending the completion of this variance request, although Ms. Carminati indicated future action would be taken.

Next testify Don Fritzges, a member of the Board of Directors of Tuckahoe Manor Homeowners Association. Mr. Fritzges similarly testified that the proposal is in violation of the covenants, and was objectionable to the community.

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Next testified Joyce Howser, secretary to the Board of Directors of the Tuckahoe Manor Homeowners Association. Ms. Howser stated that the new grade of the back yard of the property is at such a level that it covers the basement windows. The entire topography of the back yard has changed and this is in violation of the covenants. She finds this change to be objectionable and does not believe most people approve of windows being covered with finished grade.

In response, Mr. King asked for any suggestions from the Board of Directors as to what he should have done. Ms. Howser responded that it was not the Board's obligation to provide answers to those questions.

Ms. Howser indicated the neighborhood's concerns are the drainage issue; that the finished grade is not pleasing to the eye and is objectionable; and that pieces of rock and concrete have been allowed to remain behind the house in the drainage area next to the retaining wall.

Next in opposition testified Tim Brophy, of 2307 Alex Court. Mr. Brophy states that there remains significant drainage issues at the corner of his yard and water is allowed to back-up and stand on his yard. This is caused by the newly constructed retaining wall, a change in slope, and a change in the back drainage area behind the retaining wall and exiting onto his property. He is very concerned about health risks associated with standing water. According to Mr. Brophy, the surrounding neighbors who are actually affected by the drainage issue are united in their opposition. The drainage issues and the standing water caused by the drainage issues are now much worse than it was before the retaining wall was constructed.

Mr. Rynn was then recalled by the Applicant and was asked to examine the photographs introduced by the Protestants. Mr. Rynn could not say whether water was located in the area before the building of the retaining wall. He was able to say that a lot of water, before the construction of the retaining wall, came down into the drainage area. He can also recall that the Applicant's property was always muddy and wet after it rained. It does not appear, based on the photographs, that all the water is draining from adjoining properties. Prior to the construction of the retaining wall, the subject property used to be very muddy and had a lot of standing water. Mr. Rynn believes that, the situation is perhaps better, but no worse than it was before.

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### **APPLICABLE LAW:**

The Applicant is requesting a variance to Section 267-26C(6) of the Harford County Code , which states:

*“(6) No accessory use or structure, except fences shall be located within any recorded easement area.”*

Section 267-11 of the Harford County Code allows the granting of a variance to the requirements of the Code:

*“Variances.*

- A. Except as provided in Section 267-41.1.H., variances from the provisions or requirements of this Part 1 may be granted if the Board finds that:*
  - (1) By reason of the uniqueness of the property or topographical conditions, the literal enforcement of this Part 1 would result in practical difficulty or unreasonable hardship.*
  - (2) The variance will not be substantially detrimental to adjacent properties or will not materially impair the purpose of this Part 1 or the public interest.*
- B. In authorizing a variance, the Board may impose such conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary, consistent with the purposes of the Part 1 and the laws of the state applicable thereto. No variance shall exceed the minimum adjustment necessary to relieve the hardship imposed by literal enforcement of this Part 1. The Board may require such guaranty or bond as it may deem necessary to insure compliance with conditions imposed.*
- C. If an application for a variance is denied, the Board shall take no further action on another application for substantially the same relief until after two (2) years from the date of such disapproval.”*

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### **FINDINGS OF FACT AND CONCLUSIONS OF LAW:**

The Applicants have, for reasons which they attribute to error by their contractor, very significantly altered the grade of their relatively small back yard by installing an in-ground swimming pool. The pool, protruding from the ground by at least 3 feet at the point closest to the lot's rear line, requires that the site be reconstructed around it or that the pool be reinstalled and lowered into the ground. The Applicants state that their contractor would not reinstall the pool, and the Applicants accordingly acted to re-slope and re-grade the soil surrounding the pool. The re-grading, given the small size of their lot, required a retaining wall. The retaining wall was constructed without a County permit and without any appropriate engineering drawings. The retaining wall itself is about 2-1/2 feet from the Applicant's rear property line, and supports a 4 foot fence on its top. The retaining wall and fence are somewhat imposing and extend well beyond the height of fences on adjoining properties. The pool, because of its location above the original finished grade of the property, is also somewhat imposing and appears to be at a higher elevation than any of the surrounding properties, with the exception of the Rynn property to the west.

The immediate consequence of the construction of the retaining wall and re-grading of the lot, according to the neighbors, is that the drainage situation to the rear of the subject property has been made worse. Very unusually, the subject property actually adjoins 4 other lots. It appears that most, if not all, of the surface water from these lots drain to the rear of those lots and into a drainage facility located on the subject property within the rear yard area which immediately adjoins the new retaining wall.

There is much dispute as to whether the drainage is now worse or has improved by the construction of the retaining wall. It does not appear that the retaining wall eliminates any water from entering the drainage area and drainage structure to the rear of the property. While the retaining wall itself acts to stabilize the rear of the subject property, which may reduce the speed of the water entering the drainage area, it does not appear to divert water in any fashion.

Neighbors indicate that the retaining wall has increased standing water on their own property. The Applicants' testify to the contrary, that the retaining wall has reduced the standing water problem, at least on their property. Perhaps the most objective testimony is that of Mr. Rynn, the neighbor to the west, who noted that he did not suffer any sort of a drainage problem either before or after the construction of the retaining wall. He indicated, after listening to the testimony and reviewing the photographs in the file that, at the very least, the drainage on the Applicant's property had improved, and that the drainage problem on surrounding properties is no worse than it was before. It seems apparent, based on the photographs, however, that the adjoining neighbors suffer, at least occasionally, from standing water on their properties. It is unclear from the evidence whether that problem is a new one or pre-dated the construction of the retaining wall.

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It is also important to note, however, the letter from Cheryl Banigan, of the Department of Public Works, that the retaining wall does not appear to have created a drainage problem.

The Tuckahoe Manor Homeowners Association has also taken the position that the construction of the pool and the change of grade are both in violation of the covenants and restrictions. Apparently, the Homeowners Association will be taking further action in the future to enforce these alleged violations of the covenants. The Homeowners Association generally is of the position that the improvements made by the Applicants to their yard are not pleasing to the neighborhood.

Nevertheless, it is important to realize what this case is about and what it is not about. It is not about the enforcement of the private covenants and restrictions. The Board of Appeals has no power to interpret or enforce private covenants and restrictions. It is not, accordingly, within the Board's authority to resolve issues involving private covenants and restrictions.

Furthermore, this case does not involve questions of the change of grade, which the Applicants otherwise have a right to do without a variance, or the construction of the fence, which the Applicants could otherwise have done with a permit which would normally have been issued. The Board simply has no power to make a ruling on those issues even if the Board is convinced that both change of grade and/or the construction of the fence is somehow aesthetically unpleasing or creates a nuisance to adjoining neighbors.

The issue, and the only issue before the Board, is the Applicants' request for approval to construct a retaining wall within a 10 foot drainage and utility easement. There would be no need for a variance if it were not for this drainage and utility easement. The retaining wall could otherwise be constructed as a matter of right, after the issuance of appropriate permits.

The Applicants have made a case that their property is unique. The property is subject to three drainage and utility easements, the pertinent one along the rear property line being 10 feet in width. This drainage and utility easement, given the sharp, original slope of the property and the contractor's error in mis-locating the swimming pool so that it is some 3 feet out of the ground certainly created a situation that is unusual. It is also worthy of mention that other homes in the area, including the immediately adjoining next door neighbor, have similar pools and that, accordingly, the construction of a pool in this area is not at all unusual.

Accordingly, these unusual circumstances would normally combine to justify a finding of practical difficulty or unusual hardship which could only be alleviated by the issuance of a variance. Simply put, the Applicants' cannot correct the situation of the faulty placement of the pool, and can not make full use of their rear yard, without a variance for the retaining wall. It is also found that, as pointed above, a pool in this area is not unusual and is, in fact, a normal feature of some of the homes in the subdivision.



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The only reason to deny the variance would be a finding that the retaining wall somehow exacerbates a drainage problem that impacts adjoining neighbors. Some of the neighbors have submitted photographs showing standing water on their property which they attribute to the construction of the retaining wall. While those photographs show some standing water, it cannot be said, in all candor, that the situation shown rises to a level sufficient to justify a finding of adverse impact. Mr. Rynn states, creditably, that the situation appears no worse than it was prior to the construction of the retaining wall, with the situation on the subject property being much better due to the elimination of standing water on the subject property.

It is difficult, based upon the evidence, to understand how the construction of the retaining wall would create a worse standing water situation on the neighbors property than existed before. It is possible that the area at the base of the retaining wall which extends onto adjoining properties does not properly drain into the drainage structure. Given the construction of the in-ground pool and the extensive re-grading on the Applicants' property, it cannot be found with any degree of certainty that the retaining wall itself is the cause of poor drainage. In summary, it cannot be found, based on the evidence in the record, that the construction of the retaining wall exacerbates a drainage problem which may have existed on the properties of the surrounding neighbors. It is found, instead, that the retaining wall has improved the drainage situation that existed on the subject property, and certainly helps correct a problem with the faulty construction of the swimming pool. It should also be noted that the surrounding neighbors can be protected by a condition which would require the removal of the retaining wall if it is found, in the future, to contribute to a drainage problem.

It must be emphasized that the Board of Appeals cannot arbitrate all issues between neighbors and homeowners associations, nor can it interpret or apply private covenants and restrictions. Further, the Board cannot be a judge of neighborhood drainage issues. The issue before the Board is whether the Applicants suffer practical difficulty or unreasonable hardship due to some unusual condition of their property and, if so, should a variance be granted to alleviate this hardship without adversely affecting adjoining properties. It is found that, while not a totally compelling case, the Applicants have presented sufficient evidence to meet this standard.

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**CONCLUSION:**

Accordingly, it is recommended that the requested variance be granted, subject to the following conditions:

1. The Applicants obtain all necessary permits and inspections for the retaining wall.
2. If, in the future, the Department of Public Works finds that the retaining wall is contributing to a drainage problem in the neighborhood, or affecting one or more adjoining properties, the retaining wall shall be immediately removed at the Applicants' expense.

Date: JULY 21, 2005

ROBERT F. KAHOE, JR.  
Zoning Hearing Examiner

**Any appeal of this decision must be received by 5:00 p.m. on AUGUST 18, 2005.**